

APR 10 2006

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

FOR THE NINTH CIRCUIT

JUAN MANUEL OLMOS
VILLALOBOS,

Petitioner,

v.

ALBERTO R. GONZALES, Attorney
General,

Respondent.

No. 04-76532

Agency No. A75-716-471

MEMORANDUM*

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted April 5, 2006**

Before: HAWKINS, McKEOWN, and PAEZ, Circuit Judges.

Juan Manuel Olmos Villalobos, a native and citizen of Mexico, petitions for review of the Board of Immigration Appeals' ("BIA") order dismissing his appeal

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

from an immigration judge's order pretermittting his application for cancellation of removal on the ground that he is statutorily precluded from establishing good moral character. We have jurisdiction under 8 U.S.C. § 1252(a)(1) to review whether an alien's conduct falls within a per se exclusion category for purposes of eligibility for cancellation of removal. *Romero-Torres v. Ashcroft*, 327 F.3d 887, 890 (9th Cir. 2003). We review questions of law de novo, *Cabrera-Alvarez v. Gonzales*, 423 F.3d 1006, 1009 (9th Cir. 2005), and findings of fact for substantial evidence, *Moran v. Ashcroft*, 395 F.3d 1089, 1091 (9th Cir. 2005). We grant the petition for review, and remand for further proceedings.

Villalobos testified that he assisted his wife when entering the United States without inspection near Tijuana. The BIA concluded that he was statutorily ineligible for cancellation of removal and ineligible for a waiver. *See* 8 U.S.C. §§ 1101(f)(3), 1182(a)(6)(E)(i) (stating that an alien who assists another alien to enter the United States in violation of the law fails the moral character requirement for cancellation of removal). The agency, however, did not have the benefit of this court's recent decision in *Moran*, 395 F.3d at 1094, which indicates that Villalobos is eligible for a family unity waiver. *See id.* (stating that "the alien-smuggling provision . . . does not operate to deny the applicant statutory eligibility under 8 U.S.C. § 1229b(b)(1)(B) for cancellation of removal . . . because the

Attorney General may waive the applicability of the alien-smuggling provision” when the applicant assisted his spouse to enter the United States in violation of the law). Villalobos therefore remains eligible for cancellation of removal and the agency improperly pretermitted his application. *See id.*

In accordance with *INS v. Ventura*, 537 U.S. 12, 16-17 (2002) (per curiam), we remand for further proceedings consistent with this decision.

PETITION FOR REVIEW GRANTED; REMANDED.